United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

466

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19540

WILLIAM E. FARRELL, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

On Appeal From the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

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(Appointed by this Court)

September 13, 1965

QUESTIONS PRESENTED

(1) Should the District Judge have ordered a mental examination pursuant to Section 24-301(a) of the D. C. Code and delayed the trial where during the first day of trial appellant raised a question as to his mental competence and where the Legal Psychiatric Services, on the basis of a brief cell block examination of appellant, conducted at the order of the District Judge, determined that the question of appellant's mental competence could be resolved only by an examination in a mental institution?

(2) In the circumstances stated in (1) was it error for the District Judge to continue the trial and order an abbreviated 20 day examination (as compared with the normal 60 day) stating any rational basis why such a limited examination would suffice?

(3) Was, under the circumstances, the order of the Juvenile Court's waiving jurisdiction over appellant, who was under 18 years of age, and subjecting appellant to the procedure of the District Court improper in that it did not state any reasons for such action?

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UNITED STATES COURT OF APPEALS

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Appeal from Judgment of the
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JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia entered a judgment and verdict against appellant Farrell on June 18, 1965. On June 25, 1965, the District Court authorized appellant to proceed on appeal without prepayment of costs. The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Appellant was convicted of armed robbery in violation of Section 22, Title 2901 of the D. C. Code, and was sentenced for a period of 5 to 15 years.

The offense for which appellant has been convicted is alleged to have taken place on January 13, 1965. The record does not indicate when and under what circumstances appellant was taken into custody. It appears, however, that on some date prior to February 10, 1965,[1] appellant, who was at that

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[1] Counsel has been advised that appellant was taken into custody on January 24, 1965.

time under 18 years of age, was put into the custody of the Juvenile authorities of the District of Columbia.

On February 10, 1965 the Juvenile Court, by an Order signed by Chief Judge Morris Miller, waived jurisdiction over appellant pursuant to Section 11-1553 of the D. C. Code, and ordered held for trial under the regular procedure of the District Court. The Order of the Juvenile Court did not state the reasons on which this action was based.

Thereupon, on the same date, appellant was brought before a United States Commissioner. The record shows that appellant was advised of his right to counsel at the preliminary hearing, and the Commissioner offered to delay the hearing until counsel for appellant could be secured. Appellant is reported to have stated, however, that "there was no use talking to a lawyer in this matter, and that he wanted a hearing now without counsel." Such a hearing was in fact held, and appellant was committed to D. C. Jail. Bail was fixed at $2000, but appellant was unable to make bail.

An indictment against appellant was filed on March 22, 1965 to which he entered a plea of not guilty on April 2, 1965.

The trial of the case commenced on May 12, 1965 and, after a number of adjournments, it was concluded on May 17, 1965 (Tr. 1-72). District Judge Alexander Holtzoff presided.

At the trial the Government case against appellant consisted primarily of two witnesses. One witness, Ronald J. Griffin, an employee of Mario's Pizza House, testified that appellant was one of three persons who held up that store on January 13, 1965. The other was John Thomas Henry Hall III, 15 years of age, who testified that appellant had participated with him in the alleged robbery of Mario's Pizza House. A police officer, Detective Robert B. Spicknall, also testified that the day after the alleged robbery Griffin had identified appellant as one of the participants in the alleged robbery while appellant was in custody in Upper Marlboro, Maryland.

Appellant did not testify at the trial, nor were any witnesses called on his behalf.

On the day prior to the trial, appellant's mother told the defense counsel below that she believed that appellant needed a psychiatric examination (Tr. 36). Defense counsel did not take any action on this before trial because he felt

he "didn't have time to pursue this with the trial already scheduled the next day," and "that it was too late to do it anyway" (Tr. 36-37). At the first day of the trial after the Government rested its case, however, appellant's defense counsel called this matter to the attention of the Judge.

The District Judge thereupon recessed the case from May 12 and May 14, 1965 and ordered that appellant be examined by the Legal Psychiatric Services at the U. S. Court House. The Order called for a report to be made to the Court as to "whether the defendant is presently mentally competent to understand proceedings against him and to properly assist in the preparation of his defense herein."

Pursuant to this Order, appellant received a psychiatric examination in the cell block of the United States Court House on May 16, 1965. The examining staff psychiatrist, Donald Goldberg, M.D., wrote to Judge Holtzoff stating that:

> "On the basis of my examination I am unable to come to any opinion concerning whether his symptoms and complaints are due to illness or malingering. It is my feeling that a determination of his competence can only be arrived at after a period of observation and examination in a mental hospital. He is in need of a more thorough evaluation than can be done in the cellblock." (Tr. 46)

Judge Holtzoff, upon receipt of the letter, called Dr. Goldberg and told him that his letter was not responsive to the questions stated in the Order (Tr. 46). Thereupon on May 14, Dr. Goldberg sent a supplemental letter to Judge Holtzoff stating that:

> "In my opinion, Farrell is mentally competent to understand the proceedings against him. However, if the hallucinatory experiences he describes are really the manifestation of underlying mental disease, he is not mentally competent to properly assist in the preparation of his defense." (Tr. 47)

The question of appellant's mental competence to properly assist in his defense was resolved by Judge Holtzoff without further ado. He stated as follows:

> "The Court has observed during this trial frequent and constant conferences between counsel and the defendant, so it is obvious as a matter of common sense that he is perfectly competent to advise with counsel and the Court so finds on the basis of its own observations." (Tr. 48)

After the jury reached its verdict of guilty, the District Judge stated that "[a]s a part of the presentence investigation I think I shall make arrangements with the aid of the Probation Officer to have the defendant submitted

to a mental examination at St. Elizabeths Hospital." (Tr. 68) The Court, however, did not sign the Order prepared by the U. S. Attorney calling for a regular 60 day examination of appellant. The Court stated that:

> "No, I am not going to give them 60 days because I am going to dispose of this case before the end of June. . . . I do not want to commit him for a formal examination in the usual way because ordinarily we use orders of this type for examinations prior to trial. He has been tried and convicted." (Tr. 68-69)

Instead, on May 19, 1965, Judge Holtzoff signed an Order calling for a 20 day mental examination at St. Elizabeths. This examination required the Superintendent of the hospital to report on appellant's mental condition, not only at the time of trial, but also for the first time asked for an opinion as to appellant's mental condition at the time the crime was alleged to have been committed, namely January 13, 1965. On the basis of that examination the Superintendent reported that appellant was not suffering from any mental disease either on January 13, 1965 or during the period of trial from May 12 until May 17, 1965.

On June 18, 1965, appellant was sentenced for a period of 5 to 15 years, and on June 25, 1965, Judge Holtzoff entered an Order permitting appellant to proceed on appeal without prepayment of costs and ordering that the transcript, insofar as it relates to the testimony of witnesses, be prepared at the expense of the United States.

STATUTES INVOLVED

Section 24-301(a) of the D. C. Code provides in pertinent part:

> "Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital."

Section 11-1553 of the D. C. Code provides as follows:

> "When a child 16 years of age or over is charged with an offense which if committed by a person 18 years of age or over is a felony, or when a child under 18 years of age is charged with an offense which if committed by a person 18 years of age or over is punishable by death or life imprisonment, a judge may, after full investigation, waive jurisdiction and order the child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by a person 18 years of age or over; or the other court may exercise the powers conferred upon the Juvenile Court by this chapter and subchapter I of chapter 23 of Title 16 in conducting and disposing of such cases."

STATEMENT OF POINTS

1. The District Court erred when it did not order a mental examination of appellant pursuant to Section 24-301(a) of the D. C. Code prior to verdict, and further erred when it ordered an abbreviated 20 day post verdict examination of appellant instead of the 60 day examination normally ordered under Section 24-301(a).

2. The Order of the Juvenile Court waiving jurisdiction was improper in that it did not state any reason for its action.

SUMMARY OF ARGUMENT

I. Under Section 24-301(a) of the D. C. Code, the Court is required to order a mental examination upon a prima facie showing that an accused may be of unsound mind or incompetent to stand trial or to assist in the preparation of his defense. Appellant on the first day of his trial raised a question as to his competence, and the brief cell block examination of appellant at the Order of the Court by the Legal Psychiatric Services confirmed the existence of a serious question with respect to appellant's mental competence which could be resolved only by an extended examination at a mental hospital. This clearly constituted sufficient prima facie evidence of appellant's incompetence and the District Judge should have ordered a mental examination. His failure to do so constitutes reversible error.

Even assuming the District Judge could have delayed such an examination of appellant until after verdict, it was error for the District Judge to limit such an examination to 20 days (instead of the 60 day examination normally

ordered under Section 24-301(a)) for no reason other than the fact that appellant had already been tried and convicted.

II. The decision in this case should be held in abeyance until the Supreme Court decides Kent v. United States, No. 104, October Term 1965. The decision in that case may bring into question this Court's prior ruling in Kent v. United States, _____ U.S. App. D.C. _____, 343 F.2d 274 (1965) that the Juvenile Court may waive jurisdiction over children under 18 years of age without stating the reasons for its action, and may call for a remand in this case.

ARGUMENT

I. The District Court Erred When It Did Not Order Appellant Committed for a Mental Examination Prior to Verdict; In No Event was the Abbreviated Post Verdict Examination an Equivalent of a Normal Mental Examination Pursuant to Section 24-301(a)

With respect to point I appellant desires the Court to read the following pages of the reporter's transcript: Tr. 36 to 42; Tr. 44 to 48; Tr. 68-70.

It is a reversible error for a District Judge not to order a mental examination pursuant to D. C. Code Section 24-301(a) upon submission to the Court of prima facie evidence that the accused is of unsound mind or mentally incompetent to understand the proceedings against him or to properly assist in his own defense. Mitchell v. United States, 114 U. S. App. D. C. 353, 316 F. 2d 354, 359, 360 (1963).

It is clear that such a prima facie showing need not consist of proof that the defendant is in fact incompetent. Only some real indication that he may be incompetent is enough. As Chief Judge Bazelon stated in Mitchell v. United States, supra, at 360:

> "The requirement of prima facie evidence must be read in the light of the limited purposes of the requested examination. A chief

> purpose is to get evidence on whether the accused is or is not competent to stand trial. Another purpose is to get evidence on whether, if there is a trial, the jury should be instructed on insanity and criminal responsibility. It cannot reasonably be supposed that Congress intended to require the accused to produce, in order to get a mental examination, enough evidence to prove that he is incompetent or irresponsible. That is what the examination itself may, or may not, produce. If the accused already had such evidence, there would be little need for the examination."

Whether or not the original request by defense counsel for a mental examination constituted sufficient prima facie evidence to require a mental examination, it is clear that the report of the Legal Psychiatric Services which was made on the basis of the cell-block interview of appellant did constitute prima facie evidence requiring a mental examination under Section 24-301(a).

The original report submitted to the Court by the Legal Psychiatric Services stated, as we have seen, that "a determination of his [appellant's] competence can only be arrived at after a period of observation and examination in a mental hospital. He is in need of a more thorough observation than can be done in a cellblock." (Tr. 46.)

This letter certainly constituted sufficient prima facie

evidence that the accused may be "of unsound mind," and on the basis of this alone an examination under Section 24-301(a) should have been ordered.

Since this original report did not answer directly the question raised in Judge Holtzoff's Order of May 19, 1965, which was limited to the question "whether the defendant is presently mentally competent to understand the proceedings against him and to properly assist in the preparation of his defense herein" Dr. Goldberg of the Legal Psychiatric Services, submitted at the Judge's request a supplementary report in which he stated the opinion that appellant was mentally competent to understand the proceedings against him, but stated that

> "However, if the hallucinatory experiences he describes are really the manifestation of underlying mental disease, he is not mentally competent to properly assist in the preparation of his defense." (Tr. 47)

Again, on the basis of this statement, the Court should have had appellant examined in a mental hospital.

Instead Judge Holtzoff resolved the question as to appellant's mental competency to assist in the preparation of his own defense, a question a trained psychiatrist was not able to resolve

without an extensive mental examination, on the basis that he had observed "frequent and constant conferences between counsel and defendant," (Tr. 48), without, of course, hearing what the nature of these conferences was. It is clear that this cannot form a proper basis for such a ruling. As the Supreme Court stated in Duskey v. United States, 362 U. S. 402:

> "The 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him.'"

The Judge could hardly determine the rational nature of the conversations between counsel and the defendant by merely observing them from a distance.

Judge Holtzoff expressed the view that the question whether an accused is able to assist in the preparation of his own defense is "a matter of common sense" (Tr. 48), and observed that

> "You know I have always felt that the question to stand trial is not strictly a psychiatric question, it is really something that a layman could pass on; . . . . " (Tr. 39.)

It is obvious from the language and purpose of Section 24-301(a) that where there is a prima facie showing of the

mental incompetence of an accused the question as to whether the accused is in fact competent must be resolved initially by the mental hospital. It is only on the basis of such a report that the Judge may order the accused to stand trial. Cf., Whalen v. United States, ___U. S. App. D. C.___, 346 F. 2d 813 (1965).

Even if in certain circumstances a "common sense" determination of this question might be permissible, it must be based on something more than having seen the accused speak to his counsel without being aware of even the nature of those conversations.

Accordingly, we submit that it was error for the District Court to continue the trial of this case without first ordering a mental examination of appellant.

Even if we were to assume that on account of the fact that the question of appellant's competence was not raised until after the trial began, it may have been proper to delay mental examination of appellant until after verdict, [1/] we

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1/ Since defense counsel did not become aware of a possible problem as to appellant's mental condition until the day before trial (Tr. 36) a motion for a mental examination at the beginning of the trial would have been timely under the Court's decision in Mitchell v. United States, supra, 316 F. 2d at 360. We submit that the motion made during the first trial should not have been denied as untimely here, particularly since the record shows that it was not made prior to trial only because counsel was under the apparent misapprehension that such a motion would not have been timely (Tr. 36-37).

submit that the District Judge erred in ordering, without any proper reason therefor, post verdict examination much more limited than that normally accorded to the accused prior to trial.

As noted above, the post verdict examination was limited to a period of 20 days, a very much shorter period than is the practice. Mental examinations are now usually conducted for a period of 60 days, somewhat shorter than the 90 day period which had been previously the case.[1/] Surely the practice to make the mental examination for at least a 60 day period appears to be predicated upon the fact that such a period of time is usually necessary for purposes of making a determination of an accused's mental competence.

Moreover, it is generally recognized that it is more difficult to establish the accused's competence in a nunc pro tunc proceeding than it is at the actual time of trial. It is clear that if Judge Holtzoff had not ordered a mental examination after trial, this Court would have had to order a new trial, and could not have simply ordered a determination of appellant's competence as of the time of the trial. See, Dusky v. United States, 362 U. S. 402, 403.

1/ Counsel was informed by the office of the Superintendent of St. Elizabeths Hospital that the average time of commitment for purposes of a mental examination, pursuant to Section 24-301 (a), was 60 days. A previous inquiry, which counsel had made in September 1963, indicated at that time the mean time of commitment for purposes of such examination was 90 days.

Accordingly, in the procedure followed in this case, there was a much abbreviated mental examination to resolve a question somewhat more difficult than the issue which is presented when a mental examination is made immediately prior to trial. In a given case, it may, of course, be perfectly reasonable to have a 20 day examination to determine the competency of an accused even where the question is of its nature made more difficult by the nun pro tunc nature of an inquiry. Where this is done, however, we submit that there should be some kind of a rational basis for the District Court limiting a mental examination to 20 days, at least some kind of a finding in the report of the hospital that under the circumstances a 20 day examination was sufficient. Both of these elements are clearly absent here.

The only reason that the District Judge gave for limiting the mental examination to a 20 day period in addition to his remark that "No, I am not going to give them 60 days because I am going to dispose of this case before the end of June", was his statement that he did not want to commit appellant for a "formal examination in the usual way" was "because he has been tried and convicted." (Tr. 69). It was clear that

the fact that he had been tried and convicted is no reason for not providing appellant with the regular formal 60 day examination.

No matter whether the examination is conducted prior to trial or after conviction the same basic rights of the defendant are involved. As this Court stated in Overholser v. Lynch, 109 U.S. App. D.C. 404, 288 F.2d 389, 391 (1961), rev'd on other grounds, 369 U.S. 705 (1962):

> ". . . For a defendant who is subjected to trial while mentally incompetent to understand the charges against him and unable to assist in his own defense has not really been tried at all, certainly not in the sense of a 'fair' trial, which is the basic element of the due process guaranteed by the Constitution."

Thus, if a post conviction mental examination would cast doubt on an accused's mental capacity, it would be incumbent upon the trial judge to set aside the verdict. Similarly, if the examination should indicate that the accused may have a defense on grounds of insanity the trial judge may have to set aside the verdict to permit a consideration of that defense at a new trial.

The letter from the Superintendent of St. Elizabeths dated June 8, 1965 stating that appellant was not suffering from any mental disease or defect and the time of the alleged offense and the time of trial simply uses boiler plate language. It does not indicate whether a normal 60 day examination would have been necessary or desirable here, and whether there were any mental defects which could have been properly observed only during the longer period of time, which the normal policy of the hospital and the courts usually require for a mental examination pursuant to Section 24-301(a).

Accordingly, it can not be said on the basis of the record in this case that the 20 day post verdict mental examination cured the District Court's error in not ordering a mental examination, prior to verdict pursuant to Section 24-301(a), or that abbreviated examination was sufficient under the circumstances to protect the rights of the appellant.

The conviction, therefore, should be reversed and the case remanded to the District Court.

II. The Juvenile Court, Under the Circumstances, Could Not Properly Exercise Its Discretion to Waive Jurisdiction Over Appellant Without Stating the Reasons Therefor.

In Kent v. United States, _____ U.S. App. D.C. _____, 343 F.2d 247 (1965), this Court held that the Juvenile Court could properly waive jurisdiction over a juvenile pursuant to D. C. Code § 11-1553 by virtue of an order which does not indicate the grounds for the action of the Juvenile Court.

On May 3, 1965, just a few days before the trial of this case, the Supreme Court granted certiorari in the Kent case. 33 L. W. 335. This action of the Supreme Court raises some question as to whether the typical boiler plate order of the Juvenile Court waiving jurisdiction can be sustained.

We submit therefore that the decision in this case should be held in abeyance until the Supreme Court decides the Kent case and request that counsel for appellant may be permitted to file a supplemental memorandum with this Court after the decision in the Kent case comes down.

Chief Judge Bazelon in his dissent to the order granting appellant's motion in Kent for leave to withdraw a petition for a rehearing en banc noted that "there can be no intelligent

review of the Juvenile Court's waiver of jurisdiction unless the reasons therefor are stated on the record." 343 F.2d at 265. It is conceivable that consistent with this dissenting view, the Supreme Court could require, for example, that the Juvenile Court state in each case the reasons for its waiver decision. If that were so, it would be appropriate for this Court to remand this case for such purposes.

A statement by the Juvenile Court as to the reasons for its waiver of jurisdiction over appellant seems particularly essential here since the record of the District Court demonstrates a fairly obvious lack of maturity on the part of appellant.

At the preliminary proceedings before the United States Commissioner, appellant turned down the opportunity to be represented by counsel, an obviously foolhardy action for which he could have hardly had any rational reason. The notes which the United States Commissioner made for the record reads as follows:

> ". . .: in addition, Def. was advised that if he was without funds to obtain counsel, that Legal Aid Agency would be contacted on his behalf; Def. inquired about proceeding without counsel; Def. advised for the second

> and third time that this matter could be continued to allow him to obtain own counsel, contact his family about counsel or to contact Legal Aid on his behalf; Def. stated there was no use talking to a lawyer in this matter and that he wanted a hearing now without counsel."

In a similar vain the record of the trial indicates that the appellant did not follow the advise of his counsel. Note, for example, the following colloquy between Mr. Reese, appellant's counsel and the Court at the end of the trial:

> "MR. REESE: I might add that I counseled him on his legal rights and stuck to that pretty much. He was getting advice elsewhere and followed that.
>
> THE COURT: Yes, we call them jailhouse lawyers. They ruin more defendants." (Tr. 71)

Accordingly, if the Supreme Court in Kent should rule that the Juvenile Court is required to state the reason for its waiver of jurisdiction in at least some cases, the questions which such conduct raises with respect to the appellant to adequately defend himself in the adversary type of proceedings to which he was subjected would certainly make this case an appropriate one for the imposition of such a requirement.

CONCLUSION

The Judgment of conviction should be reversed and the case should be remanded to the District Court.

Respectfully submitted,

Werner J. Kronstein
Counsel for Appellant
(Appointed by this Court)

September 13, 1965

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ARGUMENT

I. The Mental Competency Issue

The Government in its brief does not contest that the report of the Legal Psychiatric Services -- which said that hospital observation was necessary to determine appellant's ability to assist in his own defense -- constituted

prima facie evidence of mental illness for purposes of Section 24-301(a) of the D.C. Code. Instead the Government argues that the District Court in its discretion could nonetheless refuse to grant a mental examination during trial, and could arbitrarily limit a post-trial examination to 20 days rather than the 60-day period normally allowed for such an examination.

Even assuming that the District Court could properly delay with the examination until after the verdict, it is clear that it could not arbitrarily limit the examination to a 20-day period.

The Government clearly concedes that the reasons given by the District Judge for ordering an abbreviated 20-day examination instead of the regular 60-day examination were arbitrary. It does not even attempt to sustain its case on the basis of the reasons given by Judge Holtzoff for so limiting the examination. These were (i) "I am going to dispose of this case before the end of June" and (ii) appellant had already been "tried and convicted." (Tr. 69)

The Government in its brief contends, however, that "if the examination were adequate, whether the reason given for its limited duration was arbitrary seems of little consequence." (Gov. Br. 13) The Government bases its contention of the adequacy of the examination on the fact that the Superintendent of St. Elizabeths Hospital did not request more time for appellant's examination.

Where a mental examination is required under Section 24-301(a), it is clear under the terms of the statute that the mental examination must be for "such reasonable period as the court may determine." This undoubtedly gives the court a broad discretion in fixing the length of the examination. In view of the firm policy of the courts to provide for a 60-day examination in the usual case, it seems clear that any departure from that policy can not be based on arbitrary grounds.[1/]

1/ Counsel has been advised that the practice of the District Court to order a 60-day mental examination is based on a policy agreement reached between the Court and the Superintendent of St. Elizabeths Hospital.

The existence of such a policy is amply reflected in this case. When the question of a post-verdict mental examination for appellant came up, the Assistant United States Attorney advised the Court that "I have prepared the regular 60-day order." (Tr. 68) Earlier Judge Holtzoff had stated that St. Elizabeths Hospital "usually insists on commitment for 90 days. Now they compromise on 60 days." (Tr. 38)

Appellant submits that the fact that the Superintendent of the hospital did not ask for an additional period of time in which to conduct the examination does not mean that 20 days was all that was needed for an adequate examination. It would appear that when the court orders an examination for a certain limited period of time the hospital would normally try to comply with that order and ask for an extension of time only in a relatively extraordinary case. We assume that the reason that a mental examination is usually for a 60-day period is that it gives the hospital a longer time to observe the defendant, and that such a longer period of observation is desirable in evaluating the mental condition of the average defendant. Since the report of the hospital gives no indication of the "tests it employed or the certainty of its diagnosis," Pouncey v. United States, ___ U.S. App. D.C. ____, 349 F.2d 669, 700 (D.C. Cir. 1965), it cannot be said that a longer period of examination would not have given a greater degree of certitude to the conclusions reached by the hospital. The Government relies on the

statement in Wynder v. United States, _____ U.S. App. D.C. _____, _____ F.2d _____, June 28, 1965, that "there is no set period required for a mental examination." (Slip Opinion, p. 2). In the Wynder case, however, the issue was an entirely different one. What was apparently challenged there was not the length of the mental examination ordered by the Court, but the length of time which was taken by St. Elizabeths to complete their mental examination. Of course, not every mental examination takes the same period of time. In one case, psychiatrists may on their own decide that a one-month examination is sufficient, while in another case they may wish to take a much longer period of time. Where, however, the time allotted by the Court is substantially less than the normal 60-day period, the psychiatrists are put in a difficult position of weighing on one side the possible greater degree of certainty that a longer examination might give them against what probably is a natural reluctance to ask the Court for such a longer period of time. The psychiatrists

should not be put in this position unless the District Court has stated some rational basis for so limiting the time for the mental examination.

II. The Waiver of Juvenile Court Jurisdiction Issue

The Government in its brief does not contest that the Supreme Court in Kent v. United States, No. 104, October Term 1965, may hold that the Juvenile Court must state its reasons for any decision waiving jurisdiction over a child.

The Government contends, however, that this case should not, as appellant requests, be held in abeyance until the decision of the Supreme Court in the Kent case comes down because (a) appellant may not raise this issue for the first time in this Court, and (b) because of the decision of this Court in Kent is controlling unless the Kent decision is overruled by the Supreme Court.

As shown below, it is clear that (a) this Court may consider this issue even though it was not raised below, and (b) that it is consistent with accepted judicial procedures for this Court to hold this case in abeyance until the Supreme Court decides Kent.

(a) The question whether the Juvenile Court's purported waiver of jurisdiction in this case was effective is clearly a jurisdictional issue which this Court may consider even though raised for the first time on appeal.

It is well established, however, that where a jurisdictional question is raised for the first time on appeal it may be considered by this Court. Indeed, this Court "may raise sua sponte defects of the District Court's jurisdiction which are apparent on the face of the record." Riley v. Titus, 89 U.S. App. D.C. 79 , 190 F.2d 653, 655 (1951). In a recent case, Waters v. United States, 328 F.2d 739, 743 (10th Cir. 1964), it was held that the statute of limitation operates as "a jurisdictional limitation upon the power to prosecute and punish" and that, accordingly, it is "noticeable" when raised for the first time on appeal.

The question whether the Juvenile Court's purported waiver of jurisdiction in this case was effective is clearly a jurisdictional issue. Unless the waiver was effective, the Juvenile Court, pursuant to D.C. Code § 11-1551, had "original and exclusive jurisdiction" and the District Court, of course, had none.

The question whether the propriety of the waiver of jurisdiction by the Juvenile Court presents a jurisdictional question was raised but not decided by this Court in Kent v. Reid, 114 U.S. App. D.C. 330, 316 F.2d 331 (1963). In that case this Court denied a petition for habeas corpus based on an allegation that the jurisdiction of the Juvenile Court was not properly waived on the grounds that other remedies were available. This Court commented, however, that "we think it is jurisdictional only in a marginal sense." This appears to be a recognition that the question presented is jurisdictional to some extent. It is, we submit, a jurisdictional issue which is certainly no more "marginal" than that presented by the question whether the statute of limitations had run. See United States v. Waters, supra.[1/]

1/ This Court could have, of course, hold this case in abeyance pending the Supreme Court's action in Kent, without deciding the question of whether this issue is in fact a jurisdictional one, particularly since it is possible that the Supreme Court's decision in this case might throw some further light on the jurisdictional nature of this question.

In any event since substantial rights are involved, this Court may notice this issue even if it were not jurisdictional. Durham v. United States, 99 U.S. App. 132, 237 F.2d 760 (1956), Rule 52(b), Federal Rules of Criminal Procedure.

We submit that it would be clearly appropriate for the Court to exercise its discretion to notice this issue even though raised for the first time on appeal. This issue undoubtedly involves basic rights of a juvenile defendant. There is nothing in the record to indicate that the issue was not raised below as the result of some strategy of counsel. The most probable explanation for the fact that the issue was not raised below is that the present case went to trial in the District Court on May 14, 1965, only a very short time after the Supreme Court granted certiorari in Kent on May 3, 1965, 33 U.S. L.Week 3355. Accordingly, counsel who, in addition to his regular practice, was busy in preparing the trial of this case may well not have had an opportunity to become aware of the Supreme Court's action, and hardly would have had sufficient time to consider its possible impact on this case.

(b) The Government argues that this Court should not await the Supreme Court's decision in Kent because, until the Supreme Court overrules it, this Court's decision in Kent is controlling. In support of this proposition the Government cites Robinson v. United States, 106 U.S. App. D.C. 325, 272 F.2d 554 (1959). In that case, however, this Court refused to wait the decision of the Supreme Court because, regardless of how the Supreme Court's decision came out, this Court's result in that case would have been the same. In Robinson the appellant had filed his appeal too late, and the Government asked this Court to delay its decision until the Supreme Court could decide the issue as to whether this Court had jurisdiction over the appeal. Since this Court concluded, however, 272 F.2d at 555, that there was no error in the case, it denied the Government's motion because "the resulting affirmance will have the same practical effect as dissmissal for want of jurisdiction." In this case, of course, the Government does not even claim that the result will be the same if this Court's decision in Kent is reversed.

This case is more like Shively v. United States, 210 F.2d 131 (4th Cir. 1954), in which the Fourth Circuit delayed its decision on an appeal awaiting a decision of the Supreme Court in another involving the same issue. The court said, 210 F.2d at 132:

> "We are advised, however, that a case involving the precise point as to the sufficiency of the indictment in charging a crime under the sections of the statute here involved is before the Supreme Court in the appeal of United States v. Dixon from the Northern District of Georgia. We shall accordingly withhold decision on this point pending the decision of the Supreme Court in that case." 1/

1/ See also the decision of the Fifth Circuit in Steele v. United States, 243 F.2d 712 (5th Cir. 1957) in which the court denied a motion to withhold its decision until the Supreme Court had acted in another case only because "the facts and issues [in that case] . . . are different from those here and no sufficient showing is made that a reversal of the decision [in the other case] . . . would require a reversal here."

CONCLUSION

The Judgment of conviction should be reversed and the case should be remanded to the District Court.

Respectfully submitted,

Werner J. Kronstein
Counsel for Appellant
(Appointed by this Court)

November 5, 1965

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief for Appellant was served on Appellee by having it hand delivered to Frank Q. Nebeker, Esq., Assistant United States Attorney, United States Court House, Washington 1. D. C., this 8th day of November 1965.

Werner J. Kronstein

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,540

WILLIAM E. FARRELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From the United States District Court for the District of Columbia

JOHN C. CONLIFF, JR.,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
CHARLES L. OWEN,
Assistant United States Attorneys.

Cr. No. 290-65

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Did the trial court abuse its discretion when, after ordering one mental examination during the trial, it did not continue the case for further psychiatric observation of the appellant?

2) Was a twenty day examination at Saint Elizabeths Hospital, beginning four days after the trial, adequate to determine the appellant's mental condition during the trial, on the date of the crime, and at the time of the examination?

(a) If so, did this examination cure any error on the part of the trial court when it did not continue the trial for further psychiatric observation of the appellant?

3) May appellant question, for the first time on appeal, the sufficiency of an order by the Juvenile Court waiving jurisdiction over him?

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TABLE OF CASES

OTHER REFERENCE

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,540

WILLIAM E. FARRELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Convicted by a jury for the armed robbery of Mario's Pizza House on the night of January 13, 1965, William E. Farrell received a sentence of five to fiteen years imprisonment. His application to proceed on appeal without prepayment of costs was granted by the trial court, and a transcript of the witnesses' testimony was prepared at Government expense.

The robbery occurred just two weeks before the defendant's eighteenth birthday. On February 10, 1965, the Juvenile Court waived jurisdiction over Farrell, and ordered that he be held for trial as an adult on two

charges of robbery and one charge of unauthorized use of a motor vehicle. In his order waiving jurisdiction, Judge Miller of the Juvenile Court stated that he was acting after "full investigation" and pursuant to 11 D.C. Code § 1553, investing that court with the discretion to waive jurisdiction of offenders over sixteen years of age who have committed what, for an adult, would be a felony. Defense counsel did not attack the waiver by moving to dismiss the indictment or by asking the District Court to redetermine the question.

The present indictment was handed up by a grand jury on March 22, 1965. In the presence of his appointed counsel, the defendant was arraigned on April 2, 1965. No pre-trial motion for a mental examination was made, and the case was called for trial on May 12, 1965.

Ronald Griffin testified on behalf of the Government that he was alone in Mario's Pizza House when three young men entered at approximately 11:25 P.M. on January 13, 1965 (Tr. 6). According to the witness Griffin, Farrell pulled a revolver from his jacket and told him to lie down on the floor. One of the other men jumped over the counter and emptied the cash register of approximately ninety-seven dollars (Tr. 6-7). On the following day, January 14, 1965, this witness was taken by Metropolitan Police to Upper Marlboro, Maryland, where he identified the defendant.[1] Fifteen year old John Hall, who was then residing at the Cedar Knoll Children's Center, testified that he was one of the participants in the robbery of Mario's Pizza House. He described in some detail how he, the defendant, and two others had waited until Griffin was alone, how three of the four had entered the store, and how the defendant had pointed a gun at Griffin and forced him to lie down. (Tr. 15-19.) When defense counsel asked the witness to state the purpose of the three in entering the shop, Hall replied simply, "To rob" (Tr. 23).

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[1] Griffin also stated that the Government's second witness, John Hall, was one of the three who participated in the January 13 holdup.

After the luncheon recess on the first day of trial, the Government presented its final witness, Detective Robert Spicknall, who had taken the witness Griffin to Upper Marlboro on the day following the robbery (Tr. 30). At the close of the Government's case, defense counsel asked to approach the bench, where he made a motion for a mental examination of Farrell (Tr. 34-35). Counsel explained that he had "just recently" learned that the defendant wanted to be examined by a psychiatrist.[2] However, this was not the first time that his attention had been drawn to the defendant's mental condition. One day before the trial began Farrell's mother had expressed her belief that her son needed psychiatric attention, and, although the record is not clear on the point, it appears that trial counsel had broached the subject to a priest in preparation of the case. (Tr. 34-37.)[3] At no time during the case did defense counsel complain that he could not effectively communicate with his client, and there were no events at trial lending support to the view that Farrell was afflicted with a mental abnormality. Moreover, he had no known record of mental illness (Tr. 37).

Notwithstanding the fact that the defendant's motion was both untimely and unsupported by facts, the Court recessed this trial for one day and permitted an examination by doctors of the Legal Phychiatric Service (Tr. 37-39). When the trial resumed, the Court explained that the Service had concluded that Farrell could understand the nature of the proceedings against him, but that he was in need of a more thorough examination than could be given in a cellblock to determine if he were malingering when he complained of hallucinations that might prevent him from properly assisting in his own defense

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[2] Farrell had apparently expressed this desire during the luncheon recess. His trial counsel stated that he was "somewhat taken aback by this" (Tr. 35).

[3] Counsel stated that he did not believe he had time to pursue the matter on the day before trial (Tr. 36-37).

(Tr. 47).[4] On the basis of the Service's report that the defendant could understand the proceedings against him, and on the additional basis of his observation of Farrell assisting counsel during the trial, the Court entered a finding of competency. Defense counsel neither moved for further psychiatric observation nor objected to the Court's finding.

The defendant did not testify or present other evidence (Tr. 49-50). On May 20, 1965, three days after the jury returned its verdict of guilty, the trial judge ordered a twenty day psychiatric examination of Farrell at Saint Elizabeths Hospital.[5] By letter dated June 8, 1965, the Superintendent of Saint Elizabeths reported that the defendant had been examined and that his case had been reviewed at a staff conference. To quote from that letter which was included in the record on appeal:

> As a result of our examinations and observation, it is our opinion that William E. Farrell is not now, and was not, on or about the time of the alleged offense, January 13, 1965, and during the trial, May 12, until May 17, 1965, suffering from a mental disease or defect. He was, therefore, mentally competent for trial, and is presently competent for the current proceeding. He is not in need of psychiatric treatment, as he is without mental disorder.

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[4] An earlier letter from Doctor Goldberg of the Legal Psychiatric Service had indicated that the defendant claimed amnesia for a period of time before and after January 13, 1965. In that first communication the doctor stated that he could not determine without examination in a mental hospital whether Farrell was malingering when he complained of visual and auditory hallucinations (Tr. 45-46). The court requested a supplementary letter, the substance of which is set out above.

[5] The case was concluded on May 17, 1965, and the defendant's examination at Saint Elizabeths Hospital began on May 21, 1965.

STATUTES INVOLVED

Title 11, District of Columbia Code (Supp. IV 1965), Section 1553, provides in pertinent part:

> When a child 16 years of age or over is charged with an offense which if committed by a person 18 years of age or over is a felony, or when a child under 18 years of age is charged with an offense which if committed by a person 18 years of age or over is punishable by death or life imprisonment, a judge may, after full investigation, waive jurisdiction and order the child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by a person 18 years of age or over; or the other court may exercise the powers conferred upon the Juvenile Court . . . .

Title 24, District of Columbia Code, Section 301(a), provides in pertinent part:

> (a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital . . . .

SUMMARY OF ARGUMENT

The defendant's motion for a mental examination at the close of the Government's case-in-chief was neither

timely nor supported by allegations sufficient to constitute *prima facie* evidence of mental illness. These defects notwithstanding, the Court recessed the trial for one day and permitted an examination of the defendant by a doctor attached to the Legal Psychiatric Service who concluded that Farrell was able to understand the proceedings against him. That same psychiatrist was not able to determine, however, whether the defendant was malingering when he complained of visual and auditory hallucinations. Even if a sufficient *prima facie* showing was made at this point, the court did not abuse its discretion when it did not order, *sua sponte*, further psychiatric observation of the defendant during the trial.

The twenty day examination of this defendant at Saint Elizabeths Hospital, beginning four days after the jury's verdict, was adequate for the purpose of determining whether he was suffering from a mental disease or defect on the date of the crime, during the trial, or at the time of the examination. There is no minimum time limit for a mental examination, and the only measure of its adequacy must come from doctors whose professional reputations back each opinion they render. Because the Superintendent's report stated that the defendant was not suffering from a mental illness on any of the dates mentioned above, and because this examination was conducted almost contemporaneously with the trial, any error on the part of the trial court was cured.

Finally, appellee submits that a defendant should not be permitted to test the validity of a waiver by the Juvenile Court for the first time on appeal. Had he made his point below, that court could have dismissed the indictment or convened itself as a Juvenile Court—in either event the issues would not be before this Court today. And if the District Court had denied such a motion, it might have stated its reasons for doing so and thereby mooted the question raised by the appellant here. If this Court, however, chooses to consider the substantive issue raised, *Kent* v. *United States* holds, in contradiction to the

appellant's position, that an order waiving jurisdiction over a juvenile need not be accompanied by a statement of reasons for doing so.

ARGUMENT

I. The trial court did not abuse its discretion when, after ordering one mental examination during the trial, it did not continue the case for further psychiatric observation of the appellant.

(Tr. 30-37, 45-48.)

The defendant first moved for a mental examination at the close of the Government's case-in-chief. In explanation of the timing of this motion, defense counsel stated that he had "just recently" talked with the defendant Farrell in the cellblock and learned that he wanted to be examined by a psychiatrist. From the transcript it appears that this conference between counsel and client occurred during the luncheon recess on the first day of trial, but no motion for an examination was heard on resumption of the trial that afternoon. Instead, the Government was allowed to present its final witness, counsel conducted cross-examination, and, after the Government closed its case, the motion was made. (Tr. 30-37.) Furthermore, counsel's attention had been drawn to the question of the defendant's mental condition prior to the trial. On the day before, the defendant's mother had expressed her belief to counsel that her son needed psychiatric treatment, and, although the record is not entirely clear on the point, it seems that counsel broached the subject to a priest in preparation for the trial (Tr. 36).

If the timing of the motion was not a tactical one, it was, at the least, not presented in the exercise of a diligence that would dispel all suggestion of that possibility.[6]

[6] Unless the trial court has the discretion to deny such a motion after the trial has begun, or to order an abbreviated examination only, defense counsel who learn the grounds for a motion at the last minute will be rewarded with a continuance or a mistrial—permitting the testimony of Government witnesses to grow dim in

And the trial court would have been warranted in denying it on the sole ground that it was untimely made. Though the question has seldom been raised, in *Mitchell* v. *United States*, 114 U.S. App. D.C. 353, 316 F.2d 354 (1963), this Court held that a motion for a mental examination under 24 D. C. Code § 301 was timely when counsel only learned of the alleged symptoms on the trial date and when he made the motion *before* the trial had begun. Noting that the request for an examination was made prior to the trial, the Court added that "the trial judge, of course, has some discretion in denying such motions as not timely." *Mitchell* v. *United States*, *supra* at 359 n.13, 316 F.2d at 360 n.13. This language would appear applicable to the present case wherein the motion was made after jeopardy attached, and, consequently, at a time when the Court had to consider an entirely different set of criteria upon which to predicate its action than did the trial judge in *Mitchell*. A mental examination, of whatever length, would tie up the jury panel for that period; it would allow the Government's testimony to grow dim in the jurors' minds, and might require a mistrial with its attendant questions of double jeopardy. Therefore, even if the defendant had produced the *prima facie* evidence of mental disease required for an examination, the trial court would not have abused its discretion in denying the motion as an untimely one.

The defendant's motion for a mental examination was defective for a second reason: it did not contain allegations sufficient to constitute the *prima facie* evidence of

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the jurors' minds as well as full discovery of the prosecution's case. Double jeopardy questions aside, this result could only discourage diligent preparation of the case and leave open, for the unscrupulous, the possibility of delaying the motion to their advantage. In the instant case, trial counsel stated at a bench conference that he did not believe he had time to pursue the quest for an examination on the day before the trial began. Whatever may have been the fact prior to the swearing of the jury, see *Mitchell* v. *United States*, discussed *infra*, his motion at the close of the Government's case was not a timely one. Of course, the utter lack of grounds in support of the motion here may have contributed to counsel's hesitancy in presenting it.

mental disease required by section 301(a) before an examination may be ordered.[7] Defense counsel represented to the court only that the defendant's mother thought her son to be in need of psychiatric attention and, furthermore, that the defendant was in favor of it personally (Tr. 34-36).[8] There was no known record of mental illness in the defendant's past (Tr. 37), no overt incidents at trial suggesting a present disease or defect, and no complaint by counsel that he could not effectively communicate with his client. Quantitatively speaking, the judge is not required to submit the insanity issue to a jury unless a defendant has produced more than a "scintilla" of evidence in support of his claim.[9] Something less, however, will suffice to entitle the accused to a mental examination if it is requested by timely motion.[10] Nonetheless, the *prima facie* aspect of section 301(a) must perforce require more than a mere expression of desire on the part of the accused to be mentally examined. And something more than a mother's belief, without supporting facts, that her son needs psychiatric attention. Assuming, for the moment, that at least a

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[7] Uncontroverted allegations in such motions will ordinarily be accepted as true. *Mitchell* v. *United States*, *supra* at 359 n.15, 316 F. 2d at 360 n.15. When the motion is made after jeopardy attaches, however, its timing is such as to call into question the motive of the movant whose allegation stands without corroboration. Accordingly, the application of the general presumption stated above may not be justified.

[8] The defendant's additional claim that a doctor and a priest would support his motion does little, without more specific information about the parties involved or the substance of their beliefs, to advance his position.

[9] *McDonald* v. *United States*, 114 U.S. App. D.C. 120, 122, 312 F.2d 847, 849 (1962) (en banc) *Accord*, *Smith* v. *United States*, 106 U.S. App. D.C. 318, 272 F.2d 547 (1959). In the *McDonald* case, this Court appears to have rejected the view impliedly approved in *Clark* v. *United States*, 104 U.S. App. D.C. 27, 259 F.2d 184 (1958), wherein the defendant's testimony that he "must have been insane" was considered adequate to require submission of the insanity issue to the jury.

[10] *Mitchell* v. *United States*, 114 U.S. App. D.C. 353, 359, 316 F.2d 354, 360 (1963).

"scintilla" of evidence of mental disease must be produced in order to give the *prima facie* requirement any substance at all, the defendant in the instant case did not make that minimal showing.[11]

Acting on Farrell's untimely and unsupported motion, the Court recessed this trial for a day and permitted an examination by doctors of the Legal Psychiatric Service.[12] The Service's initial report indicated that the defendant had complained of visual and auditory hallucinations, and concluded that no determination would be reached on the competency issue unless the defendant was observed in a hospital setting (Tr. 45-46). Specifically, the evaluation in a hospital would enable the psychiatrists to form an opinion concerning whether the defendant was malingering when he complained of hallucinations—a judgment that could not be adequately arrived at "in the cell-block" (Tr. 46). A supplementary letter from the Service clarified its position. Farrell was, in its opinion, able to understand the proceedings against him, but was not capable of assisting his counsel in the defense if the hallucinations were real (Tr. 47). After receiving this information, the trial judge entered a finding of competency on the basis of the report saying that Farrell could understand the proceedings against him, and on the basis of the Court's own observation of the assistance he was giving counsel during the trial.[13] No exception was taken by trial counsel to this finding, no hearing was requested, and no motion for an additional examination was made (Tr. 48).

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[11] Compare *Mitchell* v. *United States*, *supra* at 357-59, 316 F.2d at 358-60.

[12] The trial judge indicated that he had planned to attend the Annual Judicial Conference on the following day; the examination, therefore, did not prolong the case beyond what was already contemplated.

[13] The Court noted that "frequent and constant" conferences had occurred between counsel and the defendant in the courtroom. There had been no allegation by counsel that he could not effectively communicate with his client, and, of course, Farrell had succeeded in having his attorney request a mental examination for him.

On appeal, the defendant takes the position that the trial court was under a duty to order a mental examination of ordinary length after receiving the Legal Psychiatric Service's report—this because the report contained adequate *prima facie* evidence to "require" an examination under section 301(a). But that statute provides only that the court may, in its discretion, order such an examination when *prima facie* evidence of mental illness appears. And if timing may affect the Court's decision on a motion by counsel for a mental examination, see *Mitchell* v. *United States*, *supra*, it may certainly become an appropriate factor for the Court's consideration in deciding whether to order an examination when it has not been requested as here. For the reasons and on the authority heretofore discussed, the trial court did not abuse its discretion when it did not order further psychiatric observation of the defendant after receiving the Service's report.

Even where there is no motion for a competency hearing or a mental examination, the trial court appears to have the duty of ensuring the societal interest in seeing that no accused is convicted of an offense when he is incompetent to stand trial. See *Rollerson* v. *United States*, —— U.S. App. D.C. ——, 343 F.2d 269, 276-77 (1964). If events at the trial lend themselves to the view that an accused is not capable of consulting his lawyer with a "reasonable degree of rational understanding",[14] failure to take some action on the problem may be an abuse of discretion. See *Pouncey* v. *United States*, D.C. Cir. No. 18,565, decided June 30, 1965. Of course, a court has "wide discretion in matters affecting competence," [15] and, presumably, if a hearing or abbreviated examination did not result in a definitive judgment about the accused's competence to stand trial, a further examination might

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[14] *Dusky* v. *United States*, 362 U.S. 402 (1960).

[15] *Pouncey* v. *United States*, *supra* at p. 5 of the Slip Opinion.

be ordered *after completion* of the trial.[16] In the instant case there were no events at trial indicating that the defendant might be incompetent. And defense counsel made no representations to the Court that he was unable to communicate effectively with his client. Compare *Wider* v. *United States*, D.C. Cir. No. 18,022, decided June 7, 1965. On balance, the trial court's order for an abbreviated examination, followed by completion of the trial and a longer period of observation in a mental hospital,[17] appears to have been an effective way of protecting the defendant's interests without risking serious prejudice to the Government's case. To the extent that the appellant's contentions may touch the competency issue, therefore, the appellee submits that the trial court did not abuse its discretion in handling the matter as it did.

II. A twenty day examination at Saint Elizabeths Hospital, beginning four days after the trial, was adequate to determine the appellant's mental condition during the trial, on the date of the crime and at the time of the examination.

Appellant attacks the adequacy of the mental examination he received at Saint Elizabeths Hospital after the trial, charging that it was arbitrarily limited to twenty days and that it did not provide the observational basis necessary for the formulation of a professional opinion.[18]

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[16] *Ibid.* In *Pouncey* the court suggests that a day's recess to permit psychiatric evaluation could be had without "serious delay or prejudice." If such delay were necessary before a definitive opinion could be formed by the Service, the prudent course would be to complete the trial, particularly when it is not a long one, and order a later examination.

[17] This examination resulted in a finding that the defendant was without mental disease—presently, during the trial and at the time of the crime.

[18] If Farrell's motion for a mental examination was properly denied at the trial, and there was no duty on the court to raise the competency issue, than he was not entitled to a mental examination at all—in which case its adequacy will be immaterial.

If the examination were adequate, whether the reason given for its limited duration was arbitrary seems of little consequence. The Superintendent's report indicated that Farrell was examined by qualified psychiatrists during a period beginning May 21, 1965, and ending June 7, 1965. A staff conference on June 7, 1965, produced the opinion expressed in the Superintendent's letter that the appellant was not suffering from a mental illness during the trial, on the date of the crime, or at the time of the examination.

In *(Dallas O.) Williams* v. *United States*, 102 U.S. App. D.C. 51, 55, 250 F.2d 19, 23 (1957), this Court wrote: "The examination conducted by the psychiatrists must be of a character *they* deem sufficient for the purpose of determining the facts required." (Emphasis added.) Moreover, in *Wynder* v. *United States*, D.C. Cir. No. 18,758, decided June 28, 1965, p. 2, wherein the appellant complained that his one month examination was too short, the Court noted that "there is no set period required for a mental examination." The Superintendent did not request more time for this appellant's examination; he did, however, report on the staff conference and the conclusion reached there—indicating that the twenty day period was adequate in his and the staff's opinion to enable them to evaluate Farrell.

Appellant's assertion about the examination's inadequacy is based solely on the time factor, and is apparently made without the benefit of professional qualification. In this regard, appellee commends the reasoning in *Webber* v. *Woffard-Brindley Lumber Co.*, 113 So.2d 23, 26 (La. App. 1959).

> Insofar as defendants complain that the diagnosis was based upon a single psychiatric interview, without the aid of psysical examination or other mental or medical test, *both* psychiatrists based their diagnosis upon such a psychiatric examination, which they stated without qualification to be a sufficient basis for a correct diagnosis. In the face of this uncontradicted testimony by these specialists based

> upon their training in this recognized branch of medicine, we like the trial court are unable to accede to the argument that a psychiatric diagnosis produced as a result of such an examination should be disregarded simply because of a supposition, unfounded upon any medical training or evidence, that such examination is insufficient for the purpose.

See also Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 531-533 (1962).

A. Furthermore, this examination cured any error on the part of the trial court when it did not continue the trial for further psychiatric observation of the appellant.

In *Dusky* v. *United States*, 362 U.S. 402 (1960), the Supreme Court held that a *nunc pro tunc* hearing to determine the petitioner's competency to stand trial over a year before was inadequate. Where a pre-trial motion for a mental examination was erroneously denied, this Court followed *Dusky* in holding that a *nunc pro tunc* hearing on the appellant's competence to stand trial over one year ago would not suffice; therefore, the conviction was reversed and the case remanded for a new trial if the appellant were found presently competent to stand trial. *Holloway* v. *United States*, —— U.S. App. D.C. ——, —— F.2d —— (1964); see *Wider* v. *United States*, D.C. Cir. No. 18,022, decided June 7, 1965. And in *Pouncey* v. *United States*, *supra* at p. 5, the Court cited the *Dusky* case in connection with its observation that "inquiry into a defendant's mental condition in the *distant past* is necessarily difficult and should usually be avoided." (Emphasis added.)

Appellant Farrell's mental examination began within four days of the trial's conclusion. Unlike *Dusky* the present case does not call for a difficult retrospective determination of mental competency. With the Legal Psychiatric Service's report available, the issue of hallucination or malingering already isolated, and the benefit of immediate observation, the Hospital staff could make a

trustworthy, professional judgment. In these circumstances, therefore, appellee submits that this prompt, almost contemporaneous examination cured any error committed by the trial court in denying appellant more than an abbreviated examination during the proceedings.

III. Appellant may not question, for the first time on appeal, the sufficiency of an order by the Juvenile Court waiving jurisdiction over him. In all events, *Kent* v. *United States* is controlling.

On February 10, 1965, the Juvenile Court waived jurisdiction over the defendant and ordered him held for trial in the District Court on two charges of robbery and one charge of unauthorized use of a motor vehicle. All three offenses were committed within twenty-two days of Farrell's eighteenth birthday, and the order by the Juvenile Court stated that the decision to waive jurisdiction was taken only after "full investigation" as required by 11 D.C. Code § 1553.

For the first time, appellant attacks the validity of the Juvenile Court's waiver on this appeal. He contends that the waiver was improper because the Juvenile Court did not give the reasons for its decision to hold him for trial an an adult. If the reasons apparent on the face of this order [19] do not suffice to negate the claim that the Court's action was arbitrary or capricious,[20] appellant is still in no position to require this

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[19] The order indicates that Farrell had committed two robberies, one at gunpoint, in the space of nine days. Eleven days after the second robbery he stole an automobile, and all three offenses occurred within approximately three weeks of his eighteenth birthday when the court would have had no further jurisdiction over him. Finally, the Juvenile Court's authority over Farrell would have terminated when he reached the age of twenty-one. 11 D.C. Code § 1551(b).

[20] In *Kent* v. *United States*, —— U.S. App. D.C. ——, ——, 343 F.2d 247, 252, *cert. granted* —— U.S. —— (1965), this Court stated:

> The reviewing function of the District Court and of this Court *vis-a-vis* the merits of a waiver decision by the Juvenile Court

Court to review the question of the validity of the waiver because he did not raise the issue below. In *Kent* v. *Reid*, 114 U.S. App. D.C. 330, 334, 316 F.2d 331, 335 (1963), this Court held that the District Court was the appropriate forum to test the validity of a waiver by a motion to dismiss the indictment. It was clearly contemplated therein that the District Court's action would, in ordinary course, be reviewable by this Court. *Id.* at 332, 316 F.2d at 333. And in *Franklin* v. *United States*, 117 U.S. App. D.C. 331, 336, 330 F.2d 205 (1963), the Court held that a motion to have the trial court convene itself as a Juvenile Court for the purpose of proceeding against the appellant must be made prior to the time when jeopardy attaches. From these decisions it appears that either line of attack on the Juvenile Court's waiver—whether by asking the District Court to proceed under its power to operate as a Juvenile forum, or by dismissing the indictment because of some defect in the waiver—should be brought in the District Court initially. Had that been done in the instant case, the indictment might have been dismissed or the trial court might have chosen to proceed as in the case of a juvenile who had never been waived. In either event the present appeal would not have been taken. Furthermore, if the District Court denied the motion to dismiss, or refused to operate as a Juvenile Court, the reasons for its decision might well have been stated and the present issue mooted in the process. Due regard for the efficiency and vitality of our judicial system demands no less than the enforcement of the accepted rule that each appellant must preserve below the points he urges on appeal. *E.g.*, *Wilhite* v. *United States*, 108 U.S. App. D.C. 279, 280-81, 281 F.2d 642, 643-44 (1960); *Fuller* v. *United States*, 53 App. D.C. 88, 91, 288 Fed. 442, 445 (1923).

If, however, the Court chooses to consider the waiver argument on its merits, the appellee submits that *Kent*

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must necessarily reside within narrow limits and depend, for its affirmative exercise, upon the demonstrable existence of arbitrariness or capriciousness.

v. *United States*[21] is controlling. The court there held that the failure to state the reasons for treating the juvenile offender as an adult does not invalidate the waiver by a judge of the Juvenile Court. Recognizing that the *Kent* decison is against his position, appellant asks this Court to hold its judgment in abeyance until the Supreme Court renders its opinion in that case. But in *Robinson* v. *United States*, 106 U.S. App. D.C. 325, 272 F.2d 554 (1959), this Court held that its own rulings will remain the law of this jurisdiction "unless and until the Supreme Court reverses [them]."

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
CHARLES L. OWEN,
Assistant United States Attorneys.

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[21] —— U.S. App. D.C. ——, 343 F.2d 247 (1964), *cert. granted*, 33 U.S.L. Week 3355 (U.S. May 3, 1965) (Misc. No. 824).

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19540

WILLIAM E. FARRELL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee

SUPPLEMENTAL MEMORANDUM

One of the principal points raised in this appeal is whether the Juvenile Court could properly waive jurisdiction over appellant without a statement of reasons for such action. At the time this case was briefed and argued, this Court's decision in Kent v. United States, ____ U.S. App. D.C. ____, 343 F.2d 247 (1964) was contrary to this position urged by appellant. Since the Kent case, however, was at that time

pending before the United States Supreme Court, appellant requested in his briefs and argument that this Court hold in abeyance its decision in this case until the Supreme Court decided Kent, and he be given an opportunity to present to this Court a Supplemental Memorandum directed towards the Supreme Court's decision in Kent.

On March 21, 1966 the Supreme Court issued its opinion in Kent v. United States, 34 LW 4228. Its decision expressly held, as appellant has argued here, that a Juvenile Court cannot validly waive jurisdiction without stating its reasons for such action. Mr. Justice Fortas, in his opinion in Kent stated:

> "Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not 'assume' that there are adequate reasons, nor may it merely assume that 'full investigation' has been made. Accordingly we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the statute as requiring that this statement must be formal or that it should

> necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of 'full investigation' has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review."

He also said:

> ". . . there is no place in our system of law for reaching a result of such tremendous consequences without ceremony -- without hearing, without effective assistance of counsel, without a statement of reasons."

Furthermore, the Supreme Court in Kent, as well as this Court in Black v. United States, ____ U.S. App. D.C. ____, 355 F.2d 104 (1965), decided after the oral argument in this case, held that in the waiver proceedings in the Juvenile Court the juvenile is entitled to be represented by counsel. The records of the Juvenile Court in this case indicate that appellant, in keeping with the common practice in effect at least until this Court's decision in Black, did not have a counsel appointed to represent him, and none was retained on his behalf. Nor did appellant, of course, have an opportunity for a hearing as required by the Supreme Court in Kent.

Accordingly, it is clear that this case must be remanded to the Juvenile Court for a new determination of waiver, and if appellant is not waived on remand, the indictment in the District Court must be dismissed. Kent v. United States, supra, 34 LW at 3434; Black v. United States, supra, 355 F.2d at 107.[1/] If appellant is waived then the District Court should be required to "consider whether appellant suffered any prejudice as a result of this invalid waiver and take all necessary steps to correct it." Black v. United States, supra, 355 F.2d at 107.

Respectfully submitted,

Werner J. Kronstein
Counsel for Appellant
(Appointed by this Court)

March 28, 1966

1/ Since appellant is under 21 years of age the Juvenile Court may take jurisdiction over him and, therefore, the special procedure ordered by the Supreme Court in Kent is not appropriate.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Memorandum for Appellant was served on Appellee by having it hand delivered to Frank Q. Nebeker, Esq., Assistant United States Attorney, United States Court House, Washington 1, D. C., this 28th day of March 1966.

Werner J. Kronstein